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In the Supreme Court of the United States

OCTOBER TERM, 1979

EUGENE A. ZIPERSTEIN and JOSEPH A. LENTINI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 601 F.2d 281.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1979. A petition for rehearing was denied on July 11, 1979. The petition for a writ of cer-

tiorari was filed on August 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether pharmaceutical records given to the government by an employee of a medical clinic should have been suppressed as the fruit of an unlawful search and seizure.

2. Whether the district court abused its discretion in denying petitioners' motion for a severance.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on one count of conspiracy to defraud the government, in violation of 18 U.S.C. 371, 31 counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conducting an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). Petitioner Ziperstein was sentenced to 30 months' imprisonment and a $10,000 fine on the conspiracy count and concurrent terms of two years' probation on the remaining counts, the probation terms to run consecutively to the term of imprisonment. Petitioner Lentini was sentenced to one year's imprisonment and a $1,000 fine on the conspiracy count and three years' probation on the other counts to run consecutively to the term of imprisonment. The court of appeals affirmed (Pet. App. A1-A25).

Petitioners and their co-defendants operated 28 medical clinics in Chicago, Illinois. Petitioner Ziperstein, who owned the clinics, together with the clinic administrators, one of whom was petitioner Lentini, implemented a scheme whereby they defrauded the federally funded Medicaid program by submitting false or inflated reimbursement claims for services allegedly provided by the clinics. Two billings organizations, also owned by Ziperstein, priced and processed the billings and sold them to factoring companies that collected the amounts charged from the State of Illinois (Tr. 266-269, 727, 731, 3723). Several techniques were used to inflate the amounts of the Medicaid reimbursements. Patients were sent to clinic doctors for unnecessary examinations (Tr. 444-445, 1737-1740, 2381); petitioners pressured clinic personnel to order laboratory tests regardless of medical necessity (Tr. 447, 638-640, 698, 953-954, 975, 1185, 1970-1971, 2002-2010, 2089, 2092, 2172, 2445, 2452, 2775, 3525, 3544-3551); clinic doctors, under pressure from clinic administrators, prescribed drugs for patients without conducting a physical examination and withheld drugs from drug addicts unless they submitted to additional laboratory tests (Tr. 1204-1205, 1736-1737, 2312-2326, 3275-3276); petitioners increased the number and quantity of prescriptions above that ordered by the physicians (Tr. 834, 1207-1210, 2146, 2951, 3061); and clinic pharmacy personnel billed Medicaid for the brand name drugs prescribed by physicians but actually dispensed less expensive generic drugs (Tr. 1212, 1866-1868, 2948).

ARGUMENT

1. Petitioner Ziperstein contends (Pet. 4-8) that documentary evidence of fraudulent prescription billings should have been suppressed because the government acquired that evidence in violation of his Fourth Amendment rights.

The facts do not support petitioner's contention. The documents in question were removed from the storage area of petitioner's clinic without government participation. In July 1976, Harlan Eisentraut, who was then employed as a pharmacist at one of petitioner's clinics, called the Federal Bureau of Investigation and told Agent David Kelly that he had documentary evidence of wrongdoing in connection with the filling of prescriptions at the clinic and that he wanted to bring the documents to the FBI office (Tr. 2734-2738). Agent Kelly expressed an interest in the documents (Tr. 2737), and two days later Eisentraut brought the documents to the FBI.[1] In denying petitioner's motion to suppress, the district court found that Eisentraut gained possession of the documents before he had any contact with the FBI and that he turned the documents over to Agent Kelly without any inducement by the government (Tr. 2755-2757, 2760-2762).

Even if Eisentraut's acquisition of the documents was improper, which is far from clear, suppression

[1] The documents included prescriptions filled by Eisentraut himself, prescriptions filled by others before Eisentraut began work at the clinic, and pre-stamped prescription forms.

was not required unless the government was involved in the impropriety. *Burdeau* v. *McDowell*, 256 U.S. 465 (1921); *United States* v. *Rodriguez*, 596 F.2d 169 (6th Cir. 1979); *United States* v. *Sor-Lokken*, 557 F.2d 755 (10th Cir.), cert. denied, 434 U.S. 894 (1977); *United States* v. *Haes*, 551 F.2d 767 (8th Cir. 1977); *McSurely* v. *McClellan*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), cert. dismissed as improvidently granted, 438 U.S. 189 (1978); *United States* v. *Sherwin*, 539 F.2d 1 (9th Cir. 1976); *United States* v. *Issod*, 508 F.2d 990 (7th Cir. 1974), cert. denied, 421 U.S. 916 (1975); *United States* v. *DeBerry*, 487 F.2d 448 (2d Cir. 1973). Here, Eisentraut's offer to provide the evidence to the FBI was not the result of prior negotiations between Eisentraut and the government, nor did Eisentraut obtain the documents as a means to gain any benefit from the government. The record amply supports the district court's finding that Eisentraut's removal of the documents was not the result of government inducement but was his private act, and the court therefore properly admitted the documents into evidence.

Petitioners' first question presented is similar to one included in the petitions for a writ of certiorari in *Walter* v. *United States*, cert. granted, No. 79-67 (Oct. 15, 1979), and *Saunders* v. *United States*, cert. granted, No. 79-148 (Oct. 15, 1979). See 79-67 Pet. 3, 17-23; 79-148 Pet. 2, 8-9. Nevertheless, we do not think it is necessary to hold the present petition until the final disposition in *Walter* and *Sanders*. In the first place, both the Fifth Cir-

cuit's decision challenged in *Walter* and *Sanders* and the Eighth Circuit's decision in *United States* v. *Kelly*, 529 F.2d 1365 (1976), on which petitioners in *Walter* and *Sanders* heavily rely, focus attention on the First Amendment concerns implicated in the government's acquisition of possibly protected forms of expression through an allegedly private search and seizure. No such First Amendment interest is or could be asserted by petitioners in this case in connection with the prescription forms obtained from Eisentraut. Second, the private party in *Walter*, after discovering and reporting the allegedly obscene character of the films shipped by the defendants, apparently received and followed instructions from the FBI to hold the films until government agents arrived and to attempt to obtain the name of anyone who might call to inquire about the shipment. See 79-67 Pet. App. 19 (Wisdom, J., dissenting). When one of the defendants later called the private party and made such an inquiry, the private party denied any knowledge of the shipment and informed the FBI of the call. *Ibid.* No such private action under government instruction is present in this case. Eisentraut's delivery of the incriminating documents to the FBI was entirely voluntary and not the product of government inducement and encouragement.[2]

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[2] *Kelly* is further distinguishable from *Walter* and the present case, because there the government obtained the allegedly obscene materials from a common carrier to which the defendant had entrusted them. Arguably at least, a person's legitimate privacy interest in shipped materials is greater while they are in the possession of the carrier than after they have been mistakenly delivered to an unknown third party. The Eighth Circuit has recently declined to apply *Kelly* to facts similar to those of the present case. *United States* v. *Roberts*, No. 79-1396 (Nov. 13, 1979), slip op. 7-9.

Petitioner can prevail in this case only if *Burdeau* v. *McDowell*, *supra*, is overruled. We believe there is no reasonable possibility that this Court would do so in *Walter* and *Sanders*. Accordingly, whatever may be the resolution of the private search issue there, the government's acquisition of evidence here was proper, and further review is not warranted.

2. Petitioners also contend (Pet. 8-20) that they were denied a fair trial as a result of the district court's refusal to sever their trial from that of acquitted co-defendant Wu Win-Peng. The court of appeals' opinion (Pet. App. A3-A9), on which we rely, adequately demonstrates that petitioners have failed to show any abuse of the district court's discretion under Fed. R. Crim. P. 14.

Petitioners contend they were prejudiced by the manner in which Wu's counsel, Oliver, conducted his client's defense. They assert, first, that they were adversely affected by several of counsel's opening remarks and, second, that they were harmed by Oliver's cross-examination of nine government witnesses. Both contentions are insubstantial.

a. During his opening statement, Oliver referred to the death of unindicted co-conspirator Allen Ziperstein (Tr. 90); he did not reveal that Ziperstein had been murdered nor did he implicate petitioners in

Ziperstein's death. Oliver also stated that Wu was eager to testify because "an innocent man almost invariably is eager to take the witness stand" and "probably the more innocent he is the more anxious he is to testify in his own behalf" (Tr. 96). As the court of appeals noted (Pet. App. A6), that statement, which was merely an attempt to bolster Wu's credibility, did not constitute a prejudicial comment on the silence of the co-defendants. *United States* v. *Hutul*, 416 F.2d 607 (7th Cir. 1969), cert. denied, 396 U.S. 1012 (1970). Furthermore, the jury was adequately instructed that no presumption of guilt arises from a defendant's silence and indeed was told that it could not even discuss the subject during its deliberations (Tr. 5801). See *United States* v. *Sacco*, 563 F.2d 552, 555 (2d Cir. 1977), cert. denied, 434 U.S. 1039 (1978). Petitioners also claim prejudice from Oliver's intimation that certain defendants had attempted to tamper with witnesses (Tr. 96). Counsel's remark was supported by evidence presented at trial to the effect that petitioner Ziperstein had intimidated two witnesses (Tr. 980-981, 3866), and therefore the reference in the opening statement was justified.

b. With respect to petitioners' complaints about the cross-examination conducted by Oliver, the court of appeals correctly stated that "[t]he objections need not be specifically detailed since they all possess a common characteristic: each of these questions was allegedly prejudicial because they reiterated some point which the government had already made con-

cerning the conspiracy" (Pet. App. A6). Oliver's questioning comprised a series of attempts to demonstrate that his client was only peripherally associated with the management of the clinics and therefore was at most minimally involved in the conceded criminal enterprise. For example, Oliver's questioning of Michael Morgan (see Pet. 13-14) emphasized Wu's ineffective use of the English language, thus minimizing his managerial role (Tr. 341-346). Oliver also questioned witnesses Jordan and Armstrong concerning the source of the clinics' policies regarding unnecessary or harmful laboratory tests (Tr. 1488, 2268, 2677) and succeeded in establishing that his client was not responsible. In any event, petitioners point to no instance in which Oliver introduced incriminating evidence against them when that evidence had not already been legitimately produced by the government. Accordingly, the court of appeals correctly concluded that Oliver's cross-examination of government witnesses did not deny petitioners a fair trial.[3]

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[3] Petitioners' contention (Pet. 17) concerning Oliver's closing argument is not supported by the record. Oliver specifically requested the jury to return a not guilty verdict as to all defendants and strenuously argued for that result (Tr. 5721-5724). As the court of appeals found (Pet. App. A9), Oliver's reference to the actions of Ziperstein and Lentini were amply supported by the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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